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By Dana Latham, of the Los Angeles Bar

IF one of the purposes of the 1936 Revenue Act was to simplify our system of taxation, it failed of achievement. The new Act is, beyond a doubt, the most involved yet fathered by Congress. If it was intended, however, to reflect the attitude of the New Deal toward corporations and the tax burden which they should bear, it was successful.

Estate and Gift Taxes

The new Act leaves unchanged prevailing Estate and Gift tax rates.

Income Taxes on Individuals

Prevailing normal and surtax rates on individual incomes are maintained by the new Act. All prior Acts, however, have exempted all dividends from domestic corporations from the normal tax. The new statute subjects such dividends to the normal tax by omitting the credit therefor heretofore specifically granted. (Section 25(a).) Dividends continue to be subject to the surtax.

Taxes on Corporations

The most important changes in the new Act affect corporations. Certain of these changes are, and were intended to be, vital in nature. Whereas prior Acts have imposed a flat corporate rate, regardless of the amount of income, the 1936 Act provides a graduated *normal tax* rate scale starting at 8% on the first $2,000, with a maximum of 15% on net incomes exceeding $40,000. The average rate payable by corporations will probably be slightly less than the 13¾% rate imposed by the Revenue Act of 1934. (Section 13.)

The graduated tax just referred to is described as the *normal* tax on corporations and is somewhat analogous to the normal tax imposed on individual incomes. In determining net income subject to this normal tax, each corporation is entitled to a credit of 85% of dividends received from other corporations, thus subjecting the remaining 15% to the normal tax. (Section 26(b).) The Revenue Act of 1934 subjected but 10% of such dividends to tax, while they were totally exempt under prior Acts.

The really vital change in the 1936 Act as compared with prior Acts was the imposition therein for the first time in our Federal taxing history of a surtax on the undistributed profits of a corporation. (Section 14.) This surtax begins at 7% and increases to 27% of the so-called "undistributed net income."

Undistributed Income

Undistributed net income is the difference between adjusted net income as defined by the statute, and the sum of the "dividends paid" credit as defined by the statute, and the credit on account of contracts restricting the payment of dividends. "Adjusted net income" is in general identical with the net income subject to the normal tax, except that no credit is permitted for dividends received from other corporations. (Section 14(a).)

The credit for dividends paid is defined by Section 27 of the Act. In brief, in arriving at undistributed net income, the corporation may deduct from its adjusted net income for dividends paid only (1) amounts which have actually reduced profits available for distribution as taxable dividends, and then only to the extent that (2) such amounts are subject to tax in the hands of the distributees.

The credit for dividends paid permits a corporation to carry-over and apply against earnings for two succeeding years dividends paid in one year in excess

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American Bar Association Membership

WHEN this issue of THE BULLETIN reaches its readers, 4000 lawyers from all parts of the United States will be in Boston for the annual meeting of the American Bar Association. This year's session will be of unusual importance and interest because the members will vote upon the plan for an improved and truly representative organization of the American Bar. If the submitted proposals are adopted the Boston meeting will long be remembered as marking a new era in the history of the legal profession in America.

The Boston meeting will witness the preliminary organization of the House of Delegates of the legal profession, so constituted as to give the lawyers of the entire country representation and the right to speak and act on matters designed to improve conditions affecting the law and the administration of justice. Moreover, the meeting will be called upon to determine many issues brought to the floor of the convention through committee reports and resolutions on subjects of vital interest to all who concern themselves in the future of the profession, the courts and the administration of justice.

President Ransom, in a statement of the aims of the Boston meeting, says:

> "The proposal to amend the Constitution of the American Bar Association suggests a scrutiny of the value, if any, of associations of lawyers to the individual lawyer, and a consideration of how, if at all, such associations may be made of real significance to the individual. . . .
>
> "It appears, then, that the plan for the reorganization of the American Bar Association is substantially the organization under which the American Medical Association has attached to itself over 60 percent of the medical profession. Is there any reason to doubt that the lawyer cannot secure for himself as powerful and beneficial a national organization as our brethren in medical service secured?"

Every member of a local bar association should become a member of the American Bar Association, which, under President Ransom's leadership in the past year, has really accomplished a magnificent work.

"Service to the public" must be restored as the ideal of the Bar.

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of earnings for said year. This is somewhat analogous to now extinct net loss carry-over permitted under certain prior Acts. (Section 27(b).)

Section 26(c) specifies the types of contracts restricting the payment of dividends which will be recognized in determining the amount of undistributed net income subject to the corporate surtax. If a written contract was executed by the corporation prior to May 1st, 1936, expressly forbidding the payment of dividends, the earnings so affected may not be taxed as undistributed net income. The same is true with respect to written contracts so executed by the corporation and requiring earnings to be applied to the discharge of corporate debts either by actual payment thereof or by the creation of reserves. (Section 26(d).)

In connection with contracts of the types just referred to, it is interesting to speculate as to situations wherein the corporation is not exempt from all taxes as provided by Section 101 of the 1936 Act, but cannot, under the statute authorizing its formation, distribute its earnings to its stockholders. A strict interpretation of the taxing statute will probably subject the entire net income of such corporations to both the corporate normal and surtax.

Exempted Corporations

Certain corporations are specifically made exempt from the surtax on undistributed income here under discussion. Probably the most important is the provision exempting corporations which are both insolvent and in receivership in any court. Compliance with such conditions for any portion of any taxable year exempts said corporation from the surtax for the entire year.

The addition to the new Act of the surtax on undistributed corporate earnings just described imposes a substantial burden on the corporate executive. The credit for dividends paid, already referred to, covers only dividends actually *paid* during the taxable year and, by implication, excludes dividends declared but not paid. Accordingly, the management must determine as best it can, before the close of its year, what its net income for said year will be. In addition, if by any chance deductions taken in good faith should subsequently be disallowed, the corporation must respond not only for an additional normal tax, but also for a totally unexpected surtax on this additional undistributed net income.

Improper Accumulations of Surplus

The surtax imposed on undue accumulations of surplus for the purpose of preventing the imposition of the surtax upon the corporate shareholders has been retained. (Section 102.) This tax is *in addition to* the surtax on undistributed net incomes. The rate imposed upon undue accumulations of surplus, however, varies, depending upon whether or not the corporation in question is subject to the surtax on undistributed profits already referred to. The rate is lower if the corporation has already paid the surtax provided for by Section 14 of the Act than it is in the case of a corporation not so subject to said surtax.

The imposition of the surtax on improperly accumulated surpluses may be eliminated provided all the shareholders include in their returns their prorata share of the corporate earnings for said year, whether or not such earnings were actually distributed. The 1936 Act, however, imposes a new limitation even on this exemption. The income so returned by the shareholders must be reported at least to the extent of 90% of said net income by stockholders other than corporations. In other words, if more than 10% of the stock of any corporation is owned by another corporation or corporations, the surtax imposed by Section 102 cannot be escaped even though all the other shareholders return and pay a tax on their prorata share of the corporate income.

Surtax on Personal Holding Companies

The surtax on personal holding companies added by Section 351 of the 1934

Act is retained in the 1936 Act. The tax on the income of such personal holding companies has, however, been increased to a maximum of 48% as compared with 40% under the prior statute.

Capital Stock and Excess Profits Taxes

The capital stock tax has been retained. The rate, however, has been reduced from $1.40 per thousand dollars of declared value to $1.00. (Section 401.)

The excess profits tax, together with the rates imposed by the Revenue Act of 1935, have likewise been retained. In determining the amount of the tax, the corporation has been permitted to redeclare the value of its stock for the year ending June 30, 1936. Such right, however, is denied for subsequent years.

This tax probably continues to be the most irritating from the standpoint of the corporate manager of any tax yet imposed by our taxing statutes. If the corporate executive values his stock too low, he pays an excess profits tax. If he places his figure too high, the corporation is burdened for years to come with an undue capital stock tax. In any event it requires the management to anticipate for at least a five-year period average corporate earnings.

Profit on Liquidation of Subsidiary Corporations

In line with the present administrative policy of discouraging multiple corporations, the present Act permits, under certain specific conditions, complete liquidation of a subsidiary corporation to its parent without the recognition of the parent of taxable income therefrom. (Section 112(a) (6).)

Mutual Investment Companies

The 1936 Act recognizes for the first time in our tax history what the statute terms "mutual investment companies." A mutual investment company is defined by Section 48(e). In general, these companies are equivalent to our so-called "investment trusts."

Under Section 13(a) of the statute, such company in determining its income subject to normal tax gets no credit for dividends received from other companies as is the case with the ordinary corporation. In computing the normal tax, however, the corporation gets full credit for all dividends paid out by it to its stockholders as defined by Section 27 of the Act. The dividends paid credit, as heretofore stated, is confined in the case of the ordinary corporation to the computation of the surtax on undistributed profits. Such investment company, however, is denied the dividend carry-over permitted other corporations.

The general theory of the special treatment accorded mutual investment companies is that their income will not be taxed, provided they actually function as conduits for the transmission of substantially all their earnings to their stockholders or owners. Under no circumstances can a company which qualifies as a personal holding company under Section 351 also be treated as a mutual investment company under Section 48(e).

Common Trust Funds

The 1936 Act prescribes a method heretofore unknown in our taxing practice of taxing the income from "common trust funds." (Section 169.) A common trust fund as defined by the Act is a fund maintained by a bank under certain specified conditions.

The profits from the operation of a common trust fund are taxable only to the owners of the fund, and the trust fund as an entity is not itself subject to tax. This new treatment is provided for by the Act because of recent decisions of the Supreme Court holding certain business trusts to be associations taxable as corporations.

Taxation of Distributions by Corporations

Many substantial changes have been made by the 1936 Act in the treatment of corporate distributions:

(1) Heretofore in determining whether or not a corporation had earnings available for dividends, past deficits must first be restored. Under the new law, regardless of an operating deficit at the beginning of the year, current earnings, if distributed, are subject to tax. (Section 115(a).)

(2) In prior Acts, in determining the percentage of profit taxable under Section 117 to a shareholder from the complete liquidation of a corporation, 100% of the profit was required to be included in taxable income, regardless of the length of time the stock in question had been owned. This provision was imposed in order to prevent the liquidation of companies faced with the personal holding tax provided for by Section 351.

As a means of encouraging a reduction in corporate entities the 1936 Act permits the profits accruing to a stockholder on the liquidation of a corporation to be taxed on the regular sliding scale basis, provided the distribution to the stockholders is in complete liquidation of the corporation in question. (Section 115(c).)

(3) For many years it has been assumed that any stock dividend paid by a corporation, even in stock of another class, was exempt from tax. In a recent case, however, the Supreme Court held that where preferred stockholders received a dividend in common stock of the same company, the value of the common stock at date of receipt was subject to tax.

On this basis the new Act—Section 115(f)—alters materially prior treatment with respect to stock dividends. The present Act merely states that a stock dividend is not taxable provided it is not income within the meaning of the Sixteenth Amendment.

The new Act also provides that if a stockholder is given the right to receive cash or stock, the value of the stock, if the stockholder elects to take said stock, is taxable even though it would not have been taxable had no such right of election been offered.

(4) If a dividend is paid in property other than money, then the shareholder must include said property in income at the fair market value of the property received, regardless of the basis of said property to the corporation distributing it. (Section 115(j).)

Tax on Unjust Enrichment

This tax, which is colloquially referred to as the "windfall tax," is contained in Sections 501 to 506, inclusive, of the new statute. While its application is general with respect to any excise tax passed on but not paid, it is directed principally against AAA taxes shifted by the taxpayer to other persons.

In general, it reaches three types of enrichment:

(1) Taxes passed on to the taxpayer's vendees but not actually paid by the taxpayer.

(2) Taxes shifted by the vendee to others, for which said vendee was reimbursed by his vendor.

(3) Refunds or credits of any kind to any person where the taxes so refunded and so credited were shifted by said person to others.

The provisions of the statute for determining whether or not a shifting has actually occurred are too complicated to be herein discussed. It is sufficient to say that substantial litigation may be expected from any attempt to strictly enforce these provisions of law.

Summary

If any conclusion may be justly arrived at from an examination of the provisions of the new Act, it is that many small corporations, whose principal stockholders participate in the management of the business, would be far better off were they to dissolve and transfer their business to a general partnership.

Right of Redemption from Sales of Property Under Power of Sale

By Fred N. Arnoldy, of the Los Angeles Bar

UNDER the provisions of Chapter I, Title 9, Part Two of the Code of Civil Procedure pertaining to sales under execution, sales of personal property, and of real property when the estate therein is less than a leasehold of two years' unexpired term, are absolute. In all other cases the property is subject to redemption as provided in said chapter. Sales pursuant to a decree of foreclosure and order of sale are governed by these provisions.

It is difficult to perceive why sales of property made in the exercise of a power of sale should not be subject to this right of redemption. If sound public policy requires a statutory right of redemption in the case of sales under execution, then it likewise requires the same right in the case of sales made under a power of sale. This is recognized in at least five of the States by statutory provision to the effect that sales made in the exercise of a power of sale shall be subject to redemption in like manner and to the same effect as in the case of sales under execution.[1]

Attempted Relief

Efforts have been made to grant some relief, though meagre and inadequate, from the injustices and hardships suffered by the borrower by reason of the absolute character of sales under power of sale. Originally it was possible for the beneficiary of a power of sale, merely upon publishing the notice required in the case of sales under execution, to make an absolute sale under his power of sale. Subsequently the Legislature by amendment prohibited the exercise of the power of sale until the lapse of three months from and after the recording of a Notice of Default and Election to Sell, thus giving to the borrower this added "breathing spell" before the absolute sale of his property. The breathing spell thus provided proved of no benefit in the majority of cases, and the sale still being absolute, and not subject to redemption, the beneficiary continued as before to bid in the property for the lowest amount possible regardless of its value and to hold the borrower liable for the deficiency.

Thus did the borrower not only lose his property absolutely at the time of sale but he was, in addition, frequently mulcted for a heavy deficiency judgment far in excess of the difference between the value of his property and the amount which he had borrowed. Hence the recent outcry against deficiency judgments and the introduction by amendment of a system of appraised values of the property sold as a basis for deficiency judgments, applying equally and without necessity to sales made pursuant to a decree of foreclosure. It is, of course, apparent that where the right to redeem for the amount bid exists there can be no detriment to the borrower if the amount bid should be less than its fair value but, on the contrary, a possible benefit.

To a disinterested observer, it would seem that our legislators have in these various enactments encountered influences other than those of the borrowing public or the lender who still remains willing to accept as security a form of instrument which gives to the borrower the benefit of the right of redemption after a sale under execution. Otherwise, our legislature would long since have provided, by simple enactment, that sales under power of sale shall be subject to redemption in like manner and to the same effect as in the case of sales under execution.

[1] 42 Corp. Jur., p. 354.

A B. A. Speaks on Unauthorized Practice

AMERICAN BAR ASSOCIATION'S Special Committee on Unauthorized Practice of the Law will ask the Association, at its coming meeting in Boston, to recommend to State Courts, State Attorneys-General, State and local Bar Associations, the initiation of vigorous preventive steps to curb and end the doing of law work by lay agencies and by persons lacking in the necessary professional training and standard of ethics.

According to the report of the Committee, as sent out to members of the Association by President Ransom, "an active and energetic program" is needed, "in order to protect the public against the harmful consequences of the practice of law by unauthorized and unqualified persons," and that State Courts and State law officers should take the necessary steps.

The Committee's report points out that its activities are guided by the public interest and that it is "distinctly detrimental to the general welfare for persons and agencies to perform the functions of a lawyer when they have not met the qualifications required for a lawyer's license and are not subject to the control of the bar and are not responsible for the observance of its ethics."

The Committee announces the policy, approved by the Association Executive Committee, of direct cooperation with State and local Bar Associations in respect to unauthorized practice and the rendering of active assistance, under the authority of the President of the Association, in litigation which State and local Associations may have instituted.

Various Court decisions are reported by the Committee as important in this field. These include three recent cases in which automobile associations were enjoined from practicing law for their members, and decisions involving accountants, banks and trust companies, collection agencies, corporate organizers, notarys public and justices of the peace. In reference to realtors, the Committee has issued an opinion as to what constitutes unauthorized practice in this field.

The report closes with a reference to procedure in stopping unauthorized practice, and expresses the opinion that great progress has recently been made along procedural lines. The report asks that the Attorneys-general of the several States be urged to take steps to stamp out the practice of law by laymen and lay agencies, as inimical to the public whom these public law officers represent.

Some Mechanical Suggestions to Brief Writers

By Kenneth W. Kearney, of the Los Angeles Bar

THE printer is, of course, a printer and not a lawyer. He is paid to print what the lawyer writes and he does so faithfully, altho there are times when he would like the right to use the editorial blue pencil. Many of the mistakes that creep into the printed pages of a laboriously prepared brief could be obviated by a little more care by the author of the brief at the last moment. It often happens that errors blamed on the printer were errors in the manuscript and that it is too late to correct them when they are finally discovered. A few suggestions are offered, all of them simple, which may be useful, bearing in mind always, that a good printer can figure out almost any sort of manuscript, even in a lawyer's or doctor's handwriting:

Read your copy over carefully before the printer gets it. Some lawyers have too much confidence in the infallibility of secretaries.

Be sure the correct title is on the brief; the printer can't always figure it out from the text.

Make sure of singulars and plurals. It makes a big difference, for example, in the use of apostrophes.

Be sure the brief has the right signatures and that it makes clear whether the attorneys represent appellant or respondent.

Don't send copy to the printer "No Proof" unless it has been carefully checked.

It is a good idea to check names of cases, citations and quotations. The printer has no way of telling whether it should be Cal. App. or Cal. App. (2d).

Number the pages of copy. If a page gets out of order the printer may not be able to figure out where it belongs.

Do not bind copy. It has to be torn apart again to be distributed among several typesetters.

Single spacing should not be used for quotations. It only takes a little more paper to type it all double space. As a matter of fact, triple space for the text, and double space for the indented matter will help the printer.

Style Instructions

If you want something different from the printer's usual style, indicate it on the copy. Changes in the printed proof are charged to the author unless they are printer's errors.

If you want references in your brief made to the supplement, have the supplement printed first and a dummy sent to you. You can insert the references in the copy yourself without having the brief half reset to fill in blanks.

Tell the printer exactly when the brief must be filed and be sure you are right about it. It would be too much to ask that he be given plenty of time to print it, but given any chance at all he will get it in. If it is something jurisdictional and you make a mistake in the filing date, it may be just too bad.

Unless you are thoroughly conversant with them, take another look at the rules of the appellate and supreme courts before sending in your copy. It might make all the difference between affirmance and reversal.

Indicate which are main headings, sub-heads, sub-sub-heads, and so on.

When you correct your proof make some mark in the margin to indicate where the correction is to be made; otherwise it might be missed.

Errors in spelling will be corrected, but a proper name spelled three or four different ways is nothing short of hopeless vexation.

If you have given no specific directions as to how you want your job done, try to be content with the exercise of the printer's discretion.

Independent and Non-Political Judiciary

AN independent, impartial, non-political judiciary is the absolute essential of free government and of the continuance of liberty under law. The disposition, in some places, to treat members of the judiciary as allies or partisans of political parties or factions, destroys the whole atmosphere of impartial justice, and should be protested and resisted by the bench and Bar, along with all other good citizens. To create any suspicion that the administration of justice has become political, partial, or subject to fear or favor, strikes at the very foundation of free government. The ermine does not belong in the political club-house or in the ward contests between rival factions or political parties. The lawyers have the right and duty to do all in their power to keep the Courts and judges out of politics and to prevent the choice of judges on a partisan or political basis. One of the amazing new *credos* is that lawyers elevated to the bench may with propriety take part as actively as they please in ward and factional politics, but that they violate the proprieties if they continue to associate with lawyers, as members of the Bar Association!—(President Ransom of American Bar Association, before Alabama State Bar.)

Taking Our Judges Out of Politics

By Rollin L. McNitt, of the Los Angeles Bar

RUFUS CHOATE, one of America's greatest lawyers, in addressing the New York Constitutional Convention in 1853 upon the subject of "Judicial Tenure" stated:

> "The ideal judge—he must be a man, not merely upright, not merely honest and well-intentioned—this, of course, but a man who will not respect persons and judgment. He shall know nothing about the parties, everything about the cause. He shall do everything for justice; nothing for himself; nothing for his friends; nothing for his patrons; nothing for his sovereign."

The American Judicature Society, as well as the American Bar Association, and State and local bar associations generally throughout the United States, have been wrestling for years with the problem of how to obtain "the ideal judge" whose essential characteristics are so finely described by Mr. Choate. I think it should also be added that various organizations of laymen have recognized the problem, studied it, and made recommendations upon appropriate methods of obtaining "the ideal judge." While the scope of this article will not permit of an extended discussion of the proper method of selecting "the ideal judge," it should be noted in passing that there are four prevalent methods employed in obtaining our judiciary:

1. Election by the people.
2. Election by the legislature.
3. Appointment by the Chief Executive (President or Governor.)
4. Appointment by the Chief Justice of the Supreme Court.

Where the latter two methods are employed, it is also usual to have the appointments approved by some tribunal; for example, when appointments are made by the President under the Federal System, the confirmation is by the Senate; when the appointment is made by the Chief Justice of the Supreme Court, the confirmation is made by the Judicial Council; when the appointment is made by the Governor of a State, the confirmation is sometimes made by the Judicial Council and sometimes by the upper house of the Legislature of the State, following the Federal System.

Appointive Method

We, in California, have partially solved the problem of obtaining better judges by the adoption, so far as our Supreme Court and District Courts of Appeal are concerned, of the appointive method. It is to be hoped that at an early date the larger counties of this State, including Los Angeles County, will adopt this plan for the Superior Courts.

In the meantime, however, so far as the Superior Court is concerned, we must still wrestle with the problems of the elective system. In order to take our judges out of politics, we adopted in this state a number of years ago the principle of non-partisanship in our judiciary. This was a step in the proper direction toward securing "the ideal judge." At the same time we maintained in our system of elections generally the party principle. We recognized, however, at the time we adopted the principal of non-partisanship of the judiciary that the reasons which applied to the election of party officers do not apply to the selection of a judge. We select our Governor and other elected officials in order to carry out a certain public policy or because we expect the Governor or other public officer to reflect the wishes of the public as indicated to him from time to time through solemn referendum at the polls. The judge, however,

has no public policy to carry out other than the administration of justice to all alike. The judge should not cater to popular wishes; in fact, as indicated by Rufus Choate, the judge should ignore them. The sole test of the judge's eligibility to office should be his merits as a jurist.

There are some who believe, and I believe it can be substantiated by a full development of the facts, that many of the evils existing in the administration of justice are due chiefly to the influence of politics. That the influence of politics is responsible for many of our unfit judges upon the bench is undoubtedly true. Some students upon this subject go so far as to state that the degeneration of trial by jury, as well as the delays and other abuses in our procedure, are directly responsible to politics in our judicial system. A director of the Associated Press recently stated that the unwholesome relationship between the judiciary and the press is the result of the influence of politics in obtaining our judicial officers.

Judicial Ethics

The American Bar Association long since recognized this problem, and a committee was appointed in 1922 to draft canons of judicial ethics. This committee was headed by William Howard Taft, former President of the United States, and Chief Justice of the Supreme Court. The committee made its report and the American Bar Association, at its Philadelphia Convention on July 9, 1924, adopted the canons proposed by the committee. Canon 28 of the Canons of Judicial Ethics, as adopted in 1924, provided:

> "While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions."

It is significant to note that none of the canons of judicial ethics adopted by the American Bar Association in 1924 have been amended with the single exception of Canon 28, which was amended August 31, 1933, by the addition to the foregoing quoted provision of the following sentence:

> "He should neither accept nor retain a place on any party committee, nor act as party leader, *nor engage generally in partisan activities.*"

A check of the reports of the American Bar Association does not reveal the motive which prompted this significant amendment, and we are left to our conclusions as to the reasons which actuated the leaders of the American Bar in adding this provision. I believe that we may safely assume, however, that this last sentence was added to the canon in order to strengthen it and to sound a warning to the judges in those states where they did not have the benefit of a law such as ours making a judicial office a non-partisan office.

Canon 28

Canon 28 as amended so clearly and concisely states the principle which should actuate every candidate for judicial office that it needs no amplification. What it does need is observance on the part not only of the incumbent judge but also of all candidates for judicial office. That there are violations of this canon repeatedly, not only by members of the judiciary themselves, but also by candidates for judicial office who should observe the principle, is readily demonstrated and it is not necessary to give any illustrations.

Nor is the problem confined to this State. We find that this very year, the Chicago Bar Association was faced with the same problem. According to

reports from Chicago, five judges transgressed the above quoted canon, and, it is said, were thereupon requested to meet a committee of the Chicago Bar Association and explain. We are told that the response was the withdrawal from membership in the Chicago Bar Association of forty-one judges. We are furthermore told that the judges took the position that "it was their sacred duty to see that no body of practitioners encroached upon the independence of the judiciary." The Chicago Bar Association, of course, was merely inquiring as to the activity of the particular offenders and was not attempting to encroach upon the independence of the judiciary; and the forty-one judges who withdrew from the Chicago Bar Association because of the stand of that association in adherence to Canon 28 are to be condemned and the attitude of that great bar association commended. The episode, however, has had this salutary effect—reform in judicial selection will now probably be obtained for Chicago, if not for other sections of the State of Illinois.

Canon 30

Any discussion of this subject would be incomplete without a discussion of the scope of activities permissible to a candidate for judicial office. The canons of judicial ethics of the American Bar Association also cover this subject and attention is directed to Canon 30, which provides as follows:

> "A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.
>
> "While holding judicial office he should decline nomination to any other place which might reasonably tend to create a suspicion or criticism that the proper performance of his judicial duties is prejudiced or prevented thereby.
>
> "If a judge becomes a candidate for any office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.
>
> "He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion."

A reading and study of the foregoing canon will reveal that the scope of activity of the candidate for judicial office is restricted indeed. This canon is likewise being continually violated by many candidates for judicial office. An endeavor has been made to ascertain the construction placed upon this last sentence, and I find that the Committee on Professional Ethics and Grievances of the American Bar Association has discussed the subject not with reference to a judge who seeks re-election but with reference to a lawyer who is a candidate for election to the bench. In the hypothetical question presented to the committee, it appeared that the lawyer had conducted a radio campaign, wherein he broadcasted a series of discussions of legal problems and during the broadcast requested those having legal problems to present them to him, stating that he would answer them in his talks over the radio. While so broadcasting, he frequently made reference to his candidacy for judicial office. The committee condemned this method of publicity in the campaign of the lawyer in question for judicial office, stating that the methods employed were in direct violation of Canon 30 above quoted. The committee also made this statement:

> "It is not necessary to undertake to prescribe the limits of publicity permissible for the purpose of demonstrating one's fitness for a coveted

judicial office; it may be conceded that within proper bounds a candidate may make public manifestations of his qualifications, to the end that the electorate may form an intelligent estimate of his ability and his fitness to add honor to the office.

"We cannot, however, approve radio broadcasting or other public expression, by a candidate for the judiciary, or opinions upon legal problems submitted by constitutents or others. In our view such conduct is derogatory to the essential dignity of a lawyer who is an aspirant for judicial office. Furthermore, if the opinions expressed relate to questions of public concern or private right which later become the subject matter of litigation before him, a positive evil results in that, decisions rendered thereon, instead of coming from an open minded weigher of law and facts, will carry the taint and color of the influence and restraint of previous pronouncements, will have their source in a mind prepossessed with an opinion and a judgment in advance of hearing the whole business and all the parties. This is to the manifest prejudice of the due administration of justice."

EXAMPLE

The 1934 campaign to elect eighteen judges in the Circuit Court for Wayne County, Michigan, where Detroit is situated, presents an example of the abuses in publicity and methods employed by judicial candidates. I use Detroit as an example because the situation in Detroit is comparable to the situation here in Los Angeles, and it is far better in an article of this kind to use some other city as an illustration; yet in doing so I desire to point out that the same abuses that appeared in the 1934 Detroit campaign are prevalent in the campaign now

(Continued on page 336)

What's Wrong With This Picture?

I've often wondered.
When in court rooms.
Just how many lawyers.
Are more interested.
In whatever impression.
They may be making.
Upon spectators.
Than they are in the person.
Who is on trial.
And how many of them.
Are more interested.
In building themselves.
A reputation.
Than they are in the fate.
Of the unlucky fellow.
Whom they defend.
And how it happens.
I'm airing my views.
In this roundabout way.
Is that at a table.
Right next to me.
There sat a lawyer.
Who in a voice.
I could plainly hear.
Was telling a friend.
How lucky he was.
That he'd been engaged.
In a criminal case.
That promised to bring him.
Much publicity.
And how it was.
That publicity.
Would probably bring him.
A lot more cases.
And pretty soon.
He'd be in the money.
In a great big way.
And his friend said:
"Sure!"
And wanted to know.
About the case.
He was speaking of.
And the lawyer seemed.
Not interested.
And quieted down.
And all I heard.
Was that his client.
Was in jail somewhere.
And anyway.
In a couple of minutes.
He was off again.
On his big career.
And he was a young lawyer.
And I wanted to tell him.
That the way to win.
Was to keep uppermost.
His client's interests.
And forget himself.
But as an evesdropper.
I couldn't do that.
For there might have been trouble.
And he'd call the head-waiter.
And have me removed.
I thank you.

(By K.C.B., "Miniatures of Life" Column, in *Hollywood Citizen-News*.)

Results of The Bar Plebiscite

By George M. Breslin, Chairman Judicial Candidates and Campaigns Committee

AS a result of the plebiscite, in which 1451 ballots were cast, the Los Angeles Bar Association is endorsing all except two of the sixteen incumbent judges who are now candidates for re-election.

The candidates who received the most votes for each of the offices is endorsed by the Association. An active and widespread campaign in behalf of endorsed candidates will be conducted by the Judicial Candidates and Campaigns Committee, as provided in the by-laws.

In conducting the campaign the committee asks the cooperation of all members of the local association and the twelve affiliated associations.

The plebiscite vote is as follows:

Office No. 1
Arthur Keetch 1349
George McDill 78

Office No. 2
Harry R. Archbald 1358

Office No. 3
Hartley Shaw 1320
Hugh A. McNary 71

Office No. 4
Frank C. Collier 1272
James V. Brewer 132

Office No. 5
Edward T. Bishop 1282

Office No. 6
Walter Desmond 1380
H. R. Collins 24
Leo M. Daly 16

Office No. 7
Dudley S. Valentine 1172

Office No. 8
Lynden Bowring 379
Maurice Norcop 362
Caryl M. Sheldon 284
William A. Monten 118
Arthur E. Briggs 74
George R. Wickham 47
J. Paul Elliott 30
Fred H. Luth 27
Edward P. Peers 8

Office No. 9
George A. Dockweiler 730
Charles L. Bogue 381
Burt L. Wix 246
Oda Faulconer 70

Office No. 10
William J. Palmer 1154
Donald Armstrong 249

Office No. 11
William S. Baird 1188
John H. Alvord 180

Office No 12
Joseph W. Vickers 1272
John A. Holland 46
Clarence Hansen 40
Stanley Moffatt 23
William H. Irons 10

Office No. 13
Frank G. Swain 1189
Joseph Marchetti 113
Austin E. Longcroft 65
Ida May Adams 37

Office No. 14
Goodwin J. Knight 1286
Alfred E. Paonessa 112

Office No. 15
Arthur Crum 1138
Irvin Taplin 166
Leo Gallagher 54
Vincent Scott 24
Christopher J. Griffin 19
Louis Schneider 5

Office No 16
Thurmond Clarke 1133
Charles Francis Adams 190
Robert Clifton 30

Committee on Legal Ethics Opinions

Advertising

AN inquiry has been received from the publisher of a proposed collection of certain California statutes interpreted for the layman, asking whether "the insertion in such publication of the names of attorneys, alphabetically arranged, setting forth each name, specialty, if desired, university, address and telephone number" is deemed by this Committee to be proper. The book is described as a "compendium of everyday laws that the layman should know" and it is to contain articles written by various judges, lawyers and others explaining and interpreting some of the laws of the State of California.

The Committee is of the opinion that there is no difference in principle between such a publication of the names, addresses, etc. of attorneys, with or without biographical data relating to them, and the publication of attorneys' cards in periodicals of general circulation—a practice which is not approved. The proposed book does not fall within the category of "law lists." It is, therefore, the opinion of the Committee that the insertion by attorneys of their names in such a directory would be improper.

The foregoing opinion, like all opinions of this Committee, is advisory only. (By-laws, Article VIII, Section 3.)

Advertising

A LETTER of inquiry discloses substantially the following facts: A special anniversary edition is about to be issued of a magazine which is the official journal of a fraternal order to which many judges and lawyers belong. These member judges and lawyers are being solicited to make contributions towards the expense of its publication. A page therein is to be headed "Greetings from brothers of our order belonging to the Los Angeles Bar and State Bar of California," to be followed by two columns bearing the respective headings "Judges" and "Attorneys," below which column titles will appear the names or signatures in facsimile of the contributing judges and lawyers.

The inquiry is as to the propriety of the foregoing. The inquirer states that many of the profession solicited would regard the contribution as being in the nature of a charity donation.

The journal is a well known periodical conducted by its publishers for revenue.

Obviously the contributions solicited could not be interpreted to be charitable donations.

Canon 27 denounces advertising by attorneys, either directly or indirectly. It declares, however, that the publication of ordinary simple business cards, *being a matter of personal taste, or local custom, and sometimes of convenience, is not per se improper.* That does not mean that publication or circulation of such cards is approved or favored, but merely that no presumption of impropriety *per se* exists because of such publication or circulation. The canon does not make an

The following opinions, like all opinions of this Committee, are advisory only. (By-laws, Art. VIII, Sec. 3.)

"The Los Angeles Bar Association Committee on Legal Ethics has several times ruled that the publication of a business card by an attorney, other than the publication of an attorney's business card in a Law List, is not proper because not sanctioned by local custom in this community."

exception of such advertising as is well pointed out in the dissent to opinion 69 of the Committee on Professional Ethics and Grievances of the American Bar Association, wherein Mr. Evans stated:

> "Canon 27 merely declares that all card publications are 'not per se improper' and leaves the matter open for decision on the facts of each case."

Assuming that the publication of a simple card under certain circumstances may be proper, such a publication is not herein involved.

In opinion 24 of the American Bar Association Committee on Professional Ethics and Grievances, the facts are somewhat similar to those herein under consideration. In that opinion it is stated:

> "The committee is informed that many lawyers have without thought of impropriety authorized publication of their cards (in fraternal journals for which advertising is solicited in order to make them self supporting), not because these lawyers believe the advertising to possess any value but as a contribution to the organization which solicited it."

In that case the Committee held the publication to be improper.

In Canon 11 of Judicial Ethics is found:

> "He (the judge) should utilize his opportunities to criticize and *correct* unprofessional conduct of attorneys and counsellors brought to his attention."

It is apparent that the judges and attorneys referred to are being solicited for their contributions and it is highly improbable, if not impossible, in view of

the proposed form of the page to be published that the solicited judges are not aware of the solicitation of the attorneys who may be asked to contribute.

Therefore, if it would be improper for attorneys to enter into the proposed transaction, it would be likewise improper for the judges to do so. In fact, the judges not only would be permitting attorneys to do something tainted with unprofessionalism, but would be aiding and encouraging it instead of criticizing and correcting it. This would clearly violate the aforesaid Canon of Judicial Ethics.

The Committee is not passing upon the propriety of judges, independently of any attorneys, contributing towards a page in said journal of "Judges Greetings," containing only judges names, such contribution and publication involving a question of personal taste on the part of the judges.

Any publication calling attention to any attorney named, regardless of the omission of his address and other matter, usually appearing on a professional card may constitute advertising. The circumstances of each case must be determinative of the question.

The publication under consideration is not in consonance with the only type of publication or circulation not expressly denounced by Canon 27 of Professional Ethics, and therefore should be classed as improper.

Forwarding Fees

INQUIRY has been made as to whether or not in the opinion of this Committee (1) A, a member of the bar of California may properly rent an office in his suite to B, a member of the Mexican Bar, who is not admitted to practice in California; (2) A may properly pay a "forwarding fee" to B if B's clients upon B's recommendation should employ A in connection with their California interests; and (3) if such "forwarding fee" cannot properly be paid B, B may charge such clients directly.

(1) It is the opinion of this Committee that A may not rent an office in his suite to B if as a result thereof A's clients or the public might possibly be misled into thinking that B is an attorney-at-law admitted to practice in California. See Opinion 6 (April 28, 1925), Opinion 54 (December 14, 1931), Opinion 97 (May 3, 1933) and Opinion 115 (August 27, 1934) of the Committee on Professional Ethics and Grievances of the American Bar Association.

(2) It is further the opinion of this Committee that A should not enter into any arrangement with B for the payment of any "forwarding fee" in connection with services A performs for B's clients unless B actually shares in the responsibility or is otherwise entitled thereto for services rendered as a lawyer. Canon 34 reads as follows:

> "No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collections of commercial claims between forwarder and receiver, though one be a lawyer and the other not (being a compensation for valuable services rendered by each) is not condemned hereby, where it is not prohibited by statute."

In Opinion 97 (May 3, 1933) the Committee on Professional Ethics and Grievances of the American Bar Association declared:

> ". . . It hardly seems necessary to state that it is improper for an attorney to receive compensation for merely recommending another attorney to his client. Such a practice, if permitted, would tend to germinate the evils of commercialism and likewise tend to destroy the proper appreciation of professional responsibility."

Rule 3 of the Rules of Professional Conduct approved by the Supreme

Court of California, May 24, 1928, 204 Cal. xci, provides:

> "A member of The State Bar shall not employ another to solicit or obtain, or remunerate another for soliciting or obtaining professional employment for him; nor shall he directly or indirectly, share with an unlicensed person compensation arising out of or incidental to professional employment; nor shall he directly or indirectly aid or abet an unlicensed person to practice law or receive compensation therefrom. . . ."

It follows, therefore, that a division of fees obtained from person recommended by B not strictly in the course of B's practice would under any circumstances be highly improper. See: *Alpers v. Hunt,* 86 Cal. 78 (1890).

(3) B is entitled to fees from his Mexican clients only for services rendered or responsibility assumed. Therefore A should not enter into any arrangement or understanding with him whereby an improper division of fees is indirectly accomplished by a direct charge by him. Reference is again made to Rule 3 of the Rules of Professional Conduct which provides:

> ". . . nor shall he directly *or indirectly* share with an unlicensed person compensation arising out of or incidental to professional employment."

Work of the American Law Institute

THE American Law Institute has now published the complete Restatements of Contracts, Agency, Conflict of Laws and Trusts. It has also published the first two volumes of the Restatement of Torts. At the present time the subjects in which Restatement work is going on are Property, Torts, Sales of Land, Restitution and Unjust Enrichment (which includes Constructive Trusts, Quasi Contracts, and Kindred Matters).

The completion of the present Restatement program of the Institute will not complete the subjects of Restatement. Next fall the Institute will publish the first two volumes of the Restatement of Property and within the next year it is planned to publish the complete Restatement of Restitution and Unjust Enrichment. Work will be continued upon the Restatement of Torts and certain major parts of Property which are designated "Rights in Land."

During the past year two additional subjects have been considered by the Institute with a view to making them a part of the work of Restatement, namely, the law of Associations and the law of Security. It has been decided to take up first the Restatement of the law of Security, which, while not so wide in scope as the law of Associations, deals with matters of vital importance to the business world, covering all transactions by which security is given for the payment of money, whether the security takes the form of personal guarantees, the pledge of personal property or the mortgage of real property.

The Institute has already begun work on an Aeronautical Flight Act and an Act relating to Truth as a Defense in Civil Libel. Substantial preliminary work on a Property Act has been done, and the Institute will shortly call the first conference on an act relating to Contributions between Joint Tortfeasors. The National Conference of Commissioners on Uniform State Laws is co-operating in the Aeronautical Flight Act and the act relating to Contributions between Joint Tortfeasors and the Property Act.

Of the 160,000 lawyers in the United States, only about one-fourth belong to the American Bar Association. Membership in voluntary bar associations, in states having no integrated bar, amounts to only half of the lawyers in such states.

TO MEMBERS OF THE LOS ANGELES BAR ASSOCIATION AND TWELVE AFFILIATED BAR ASSOCIATIONS

In order to carry on an effective campaign in behalf of the sixteen judicial candidates endorsed by the Los Angeles Bar Association and affiliated associations additional funds are urgently needed.

Consequently, every member of the local and affiliated associations is urged to contribute as generously as possible to the plebiscite fund.

This is your invitation to aid the association in maintaining the high standard of the Los Angeles County judiciary.

Make your checks payable to the Judicial Candidates and Campaigns Committee of the Los Angeles Bar Association, and send them to 1124 Rowan Building.

JUDICIAL CANDIDATES AND CAMPAIGNS COMMITTEE
OF THE LOS ANGELES BAR ASSOCIATION.

SOMETHING TO THINK ABOUT!

Do you know that 2500 cases that had been awaiting trial in the New York courts for two years and more, were taken out of court and settled by arbitration? That the American Arbitration Association, organized by New York business men a few years ago has become nation-wide in its operations, with official arbitrators in 1600 cities and a membership of 7000?

(Continued from page 328)

being conducted in this city. We are informed that in Detroit, in 1934, the advertising of various candidates for judicial office gave ground for criticism. Among the deceptive advertisements was one: "Re-elect Judge ——", the candidate never having occupied the position sought but having once served for a short time as judge of an inferior court. Various slogans were adopted, such as "Let's humanize justice", and "The people's judge." A young lawyer who had been but recently admitted, it is alleged, used the words upon his card: "Succeed with successful ———." Another candidate proclaimed from the billboards in the City of Detroit: "His record protects you." Another candidate made an appeal: "Demanding better living conditions for everybody." Another stated as his sole basis for qualification that he was "President of the Basketball Association and a member of the Municipal Athletic Commission," while still another candidate went to the extreme by stating that he was "the ablest trial lawyer in Detroit." Another solemnly announced: "My greatest treasures are my wife and seven children." One of the candidates appealed to men over forty-five, with a cartoon showing an employer firing a man because he was forty-five years old, and featured the candidate as a judge on the bench saying "Men over forty shall not be forgotten; the right to live and let live shall prevail over the right of money to make more money."

It is also significant to note that in the Detroit campaign, where partisanship was injected into the campaign in 1934, that there were thirty-nine candidates at the Republican primary for the eighteen nominations and one hundred eighty-one candidates on the Democratic primary ticket. It so happened that one of the incumbent judges, who was reputed to be an able judge, was a Democrat. The injection of partisan politics into the campaign resulted in the defeat at the final election of the one Democratic incumbent judge and the re-election of the

seventeen incumbent Republican judges, together with a Republican judge in the place of the able Democratic incumbent judge who was defeated. Need more be said on the practicality of keeping partisanship out of judicial campaigns?

Los Angeles Problem

Here in Los Angeles, where we have a serious problem, as a large center of population, where the election of a judge is largely a popularity contest because of the inability of the electorate to determine the fitness and qualification of men running for judicial office, the Los Angeles Bar Association should take a more active part as long as we have the elective system than it is now doing. At the present time the activity of the Los Angeles Bar Association consists simply in the conducting of a plebiscite for the determination of those in the opinion of the association best qualified to hold judicial office. It is true that the Bar Association follows up this plebiscite by conducting a campaign in behalf of the judges endorsed in the plebiscite. This is not sufficient, in my opinion, to cope with the situation.

The By-laws of the Los Angeles Association upon the subject of the plebiscite should be amended so as to provide for the taking of the plebiscite at an earlier date in order to determine the fitness of the incumbent judges, and if the Bar Association determines that an incumbent judge who is seeking re-election is not properly qualified to hold judicial office, the Bar Association itself, through its judiciary committee or some other channel, should select and draft outstanding men to run against the incumbent rejected in the plebiscite. This is the least that we can do as an Association to meet our full obligation to the community as long as we continue the elective system in Los Angeles County. There will be those who criticize this suggestion; to those I say that Benjamin Franklin, one of the fathers of our Constitutional System in this country, advocated the selection and nomination of judges by lawyers.

May I not conclude with the opinion of Mr. Stuart H. Perry, a director of the Associated Press, who stated in an address before the Academy of Political and Social Science on May 24, 1935:

> ". . . thoughtful Americans who see the vital necessity of freeing the administration of law from the blighting affliction of politics no longer need feel that their voice is like that of one preaching in the wilderness, but that it expresses a profound and increasing popular demand. Much work must yet be done. It will be arduous at times, and not free from disappointments. But the end justifies all possible exertion, and ultimate success now seems to be assured."

Land Owners' Rights in Connection With Flight of Aircraft Above Land

By Warren Jefferson Davis** of Los Angeles Bar

RIGHTS of a land owner in connection with the flight of aircraft above his land are definitely decided by the United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Hinman v. Pacific Air Transport* and *United Air Lines Transport Corporation,* in its decision on July 20, 1936.

In the Court's opinion, the case presented by the land owners, "rests upon the assumption that as owners of the soil they have an absolute and present title to all the space above the earth's surface, owned by them, to such a height as is, or may become, useful to the enjoyment of their land."

"This height, the appellants assert in the bill, is of indefinite distance, but not less than 150 feet.

"If the appellants are correct in this premise, it would seem that they would have such a title to the airspace claimed, as an incident to their ownership of the land, that they could protect such a title as if it were an ordinary interest in real property. Let us then examine the appellants' premise. They do not seek to maintain that the ownership of the land actually extends by absolute and exclusive title upward to the sky and downward to the center of the earth. They recognize that the space claimed must have some use, either present or contemplated and connected with the enjoyment of the land itself.

"Title to the airspace unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.

"Since, therefore, appellants must confine their claim to 150 feet of the airspace above the land, to the use of the space as related to the enjoyment of their land, to what extent then, is this use necessary to perfect their title to the airspace? Must the use be actual, as when the owner claims the space above the earth occupied by a building con-

**Author of "Aeronautical Law" (1930); "Aeronautical Law Supplement" (1933); "The Law of Air Carriers" (1934), etc. (Parker, Stone & Baird, Los Angeles.)

structed theron; or does it suffice if appellants establish merely that they may reasonably expect to use the airspace now or at some indefinite future time?

"This, then, is appellants' premise and upon this proposition they rest their case. Such an inquiry was never pursued in the history of jurisprudence until the occasion is furnished by the common use of vehcles of the air."

Upon this premise the case was presented.

"We believe," says the Court, "and hold that appellants' premise is sound. The question presented is applied to a new status and little aid can be found in actual precedent. The solution is found in the application of elementary legal principles. The first and foremost of these principles is that the very essence and origin of the legal right of property is dominion over it. Property must have been reclaimed from the general mass of the earth, and it must be capable by its nature of exclusive possession. Without possession, no right in it can be maintained.

"The air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it. This principle was announced long ago by Justinian. It is in fact the basis upon which practically all of our so-called water codes are based.

"We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land. This right is not fixed. It varies with our varying needs and is coextensive with them. The owner of land owns as much of the space above him as he uses, but only so long as he uses it. All that lies beyond belongs to the world.

"The premise of the appellants, held by the court to be sound, is the recognition by appellant that ownership of land does not extend title to the sky, and that the space claimed must have some use connected with the enjoyment of the land itself."

The Court rejected in its entirety the application of the "Ad coelum" doctrine, saying: "We think it is not the law, and that it never was the law."

"This formula 'from the center of the earth to the sky' was in-

vented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the over-lying space to such an extent as he was able, and that no one could ever interfere with that use.

"This formula was never taken literally but was a figurative phrase to express the full and complete ownership of land and the right to whatever superjacent airspace was necessary or convenient to the enjoyment of the land.

"In applying a rule of law, or construing a statute or constitutional provision, we cannot shut our eyes to common knowledge, the progress of civilization, or the experience of mankind. A literal construction of this formula will bring about an absurdity. The sky has no definite location. It is that which presents itself to the eye when looking upward, as we aproach it, it recedes. There can be no ownership of infinity, nor can equity prevent a supposed violation of an abstract conception."

The Hinman case follows the *Smith*,[1] *Swetland*[2] *and Thrasher*[3] cases in eliminating any doctrine of absolute ownership of the air, predicated upon the "Cujus Est Solum" theory.

Trespass

The Court, however, in its decision goes further than in the three decisions referred to. The Court in the Swetland case apparently assumed a hypothetical case could be conceived (upon a proper statement of facts in a bill of complaint) where flight through a so-called lower stratum might be a trespass, and any attempt to draw a distinction between an upper and lower stratum of air space is rejected in the opinion of the court in the instant case.

The Court very clearly pointed out, that any use of such air or space by others, which is injurious to his land, or which constitutes an actual interference with his possession or his beneficial use thereof, would be a trespass for which he would have remedy, but any claim of the land owner beyond this cannot find a precedent in law, nor support in reason.

With this announcement of the remedy for interference with the rights

1. Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385 (1930).
2. Swetland v. Curtiss Airports Corp., et al., 55 F. (2d) 201.
3. Thrasher v. City of Atlanta (Ga., 1934), 173 S. E. 817.

of landowners, the Court decided that the landowners, in two appeals before the Court, were not entitled to injunctive relief,

> "because no facts are alleged with respect to circumstances of appellants' use of the premises which will enable this Court to infer that any actual or substantial damage will accrue from the acts of the appellees complained of."
>
> "In the instant case, traversing the airspace above appellants' land is not, of itself, a trespass at all, but it is a lawful act unless it is done under circumstances which will cause injury to appellants' possession."

The Court was equally emphatic in summarily disposing of the contention that, "continuous use of the airspace in question may, or will ripen into an easement."

> "The English doctrine that an easement for light and air may be acquired by user or prescription has been very generally rejected in the United States. See also 1 Thompson on Real Property, p. 652, §542, also 22 L. R. A. 536, where many cases are cited in support of this rule. We therefore hold that it is not legally possible for appellees to obtain an easement by prescription through the airspace above appellants' land. *Portsmouth v. United States,* 260 U. S. 327, 43 S. Ct. 135, is not at variance with this holding, for in that case it is apparent that the use or occupancy of the airspace, if it can be so considered, was under such circumstances as amounted to a taking of the surface also."

Forward Step.

The decision in this case is a marked forward step in the development of Aeronautical Law in the United States.

The question of ownership of air space has brought divergent theories.

1. Absolute ownership by the landowner of the air space above his land to an unlimited height.
2. Ownership of the air space by the landowner to an unlimited height, subject to the easement or other privilege of aviation. (Proposal expressed in American Law Institute tentative draft No. 7, "Restatement of the Law of Torts.")
3. Ownership of the air space by the landowner of *only so much* of the column of air above the premises as is necessary for his present enjoyment of the

surface including the structures, trees and other growths thereon; the landowner being protected against intrusions in the air space above his property which interfere unreasonably with his use and occupancy of the land and structures thereon. (Alternative proposal expressed in American Law Institute tentative draft No. 7, "Restatement of the Law of Torts.")

This theory does not conflict with the decision of the Circuit Court of Appeals in the case of *Swetland, et al. v. Curtiss Airports Corp., et al.*, 55 F. (2d) 201, (C. C. A. 6th, decided December 30, 1931), that there may be such a continuous and/or permanent use of the lower stratum by some person other than the landowner, which stratum the landowner may reasonably expect to use or occupy, as to impose a servitude upon the landowner's use and enjoyment of the surface. The landowner may prevent the imposition of servitudes upon his expected use of the surface, in the zone of expected use in the lower stratum, either by his remedy for trespass or nuisance, and he has the right to prevent a nuisance in the upper stratum, which he may not reasonably expect to occupy.

4. Ownership by the landowner of the air space to the height of "useful occupancy" or "effective possession."

5. The theory of non-ownership of air space by the landowner, but, as an incident to, and growing out of ownership of the land, the right to take possession of such air space as may be necessary to the enjoyment of the land.

Under this theory we have a complete denial of ownership of unenclosed air space.

Dominant Right

Out of land ownership has grown the dominant right of occupancy above the land for purposes incident to the use and enjoyment of the surface.

We have a new concept of property rights as applied to the air, limited to "useful occupancy" or the right to take "effective possession."

The landowner with regard to the air space above his property is restricted to such "useful occupancy" thereof as may be "incident to his use and enjoyment of the surface."

The necessity of finding some method by which aviation may lawfully be

carried on without interference with the surface owners, leads Professor Bohlen, of the University of Pennsylvania Law School, to express the hope that the Commissioners on Uniform State Laws in the drafting of a Uniform State Aeronautical Code will "secure a freedom of aviation sufficient to satisfy the public need of air transportation, but at the same time will adequately guard the legitimate interests of the surface owner."

It may be that the landowner's rights in and to the air space above his property should be limited in the interest of the common welfare to that part of the superincumbent air space for which the landowner may have practical use. This theory is in consonance with the theories as expressed in the codes of many European countries. Recognition of this principle has given rise to the theory of "effective possession."

To hold that the private landowner has no property rights in superjacent air space works no hardship upon the owner of the land. Ample protection from any damage or hardship is afforded through the remedy of nuisance. There being no ownership of the air space, there could be no derogation of plaintiffs' rights by imposition of any servitude or creation of prescriptive rights.

Such a view with regard to property rights in the air is in consonance with the opinion of the Court in the *Swetland* case that it is the "traditional policy of the Courts to adapt the law to the economic and social needs of the times," the Court indicating that this will be the measure used "to define the rights of the new and rapidly growing business of aviation."

*** The Commissioners on Uniform State Laws are now working on the preparation of a Uniform Aeronautical Code, which will appear in three parts:

Part I —Uniform Airports Act.

Part II —Uniform Aeronautical Regulatory Act.

Part III—Uniform Aeronautical Flight Act.

The American Law Institute is cooperating with the Commissioners on Uniform State Laws in preparing a Uniform Act dealing with the substantive law of flight, and a preliminary draft of the act will probably be ready for consideration by the American Law Institute and the Commissioners on Uniform State Laws during 1937.